Remarks

Claims 1, 3-13 are pending.

Claims 1 and 3-13 are rejected under 35 U.S.C. 102(e) as being unpatentable over Ficco (U.S. Pub. No. 2005/0166224 A1).

Applicants respectfully traverse the rejections, and as previously argued, submit that Applicants have provided more than sufficient evidence to antedate the Ficco reference.

The Examiner states that the Applicants' previous response was insufficient to demonstrate diligence on the part of the inventors and its attorneys to file the present application. Contrary to the Examiner's view, Federal Circuit case law holds that constant effort is not required to show diligence and the inventor need not spend **all** his time working on the invention. *See Myocen Plant Sciences, Inc. v. Montsanto Co.,* 252 F.3d 1306 (Fed. Cir. 2001) (emphasis added). Applicants respectfully submit that the Examiner's reliance on the activity during a small portion of the critical period of sixteen (16) days is overly restrictive and unduly burdensome. The evidence shown by the Haberman and Schuler declarations clearly show diligent activity in prosecuting and filing the present application.

The Examiner cites *In re Mulder*, 716 F.2d 1542, 1545, (Fed. Cir. 1983) for the position that "a 2-day period lacking activity has been held to be fatal." In *Mulder*, however the two day period was the **entire** "critical" period and there was "a total lack of evidence of diligence." *In re: Mulder* at 1545. For the Examiner to appropriately apply the findings in *Mulder* as analogous to the present matter there would have had to have been a **total lack of activity** during the entire 16 day period. As the Examiner admits, there was significant activity shown during the sixteen day critical period.

Further, even considering the intermittent activity during the sixteen days in question, the Federal Circuit, and its predecessor court the United States Court of Customs and Patent Appeals ("CCPA"), have recognized that it is easier to account for short periods of delay and inactivity. In *Sletzinger v. Lincoln*, 410 F.2d 808 (CCPA 1969), an opposing party pointed to a number of short gaps during the critical period, such as a two-day period between execution of the complete patent application and its mailing to the Patent Office. The court held that this gap "of such short duration" was on of "the inevitable minor interruptions accompanying the conduct of patent prosecution" and fell "within the limits of reasonable diligence." *Sletzinger* at 812-813. Accounting for the entire period during which diligence is required does not mean that every second of every day must be spent toward reducing the invention to practice. Such an interpretation is overly narrow and unreasonable to expect of any inventor.

Diligence is proved upon showing that there were no unreasonable gaps over the entire critical period and the inventors have exhibited reasonably continuous activity in filing their application. The five of sixteen days on which the Examiner bases his findings are not nothing more that the inevitable minor interruptions accompanying the conduct of patent prosecution. Clearly the inventors' and its counsel's activities fall within the limits of reasonable diligence.

CONCLUSION

For at least the reasons outlined above, Applicant submits that this application is in condition for allowance and requests favorable action in the form of a Notice of Allowance. Please apply any charges or credits to Deposit Account No. 50-1721.

If, in the Examiner's opinion, a telephonic interview would expedite the favorable prosecution of the present application, the undersigned attorney would welcome the opportunity to discuss any outstanding issues, and to work with the Examiner toward placing the application in condition for allowance.

Respectfully submitted,

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